No. 10,378

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MONTGOMERY WARD & Co. (a corporation),
Appellant,

vs.

CHESTER A. LAMBERSON and LYDIA LAMBERSON,
Appellees.

Upon Appeal from the Judgment of the District Court of the United States for the District of Idaho, Eastern Division.

BRIEF OF APPELLANT, MONTGOMERY WARD & CO., INCORPORATED.

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THE PARTIES.

Hereafter in this brief we shall refer to the plaintiff and appellee Chester A. Lamberson as "plaintiff husband," plaintiff and appellee Lydia Lamberson as "plaintiff Lydia Lamberson," or as "plaintiff wife," plaintiffs and appellees Chester A. and Lydia Lamberson as "plaintiffs" and defendant and appellant Montgomery Ward & Co., Incorporated as "defendant."

STATEMENT AS TO JURISDICTION.

On June 4, 1942, plaintiffs filed their action against defendant in the District Court of the United States for the District of Idaho, Eastern Division, alleging that plaintiff wife had sustained damages as the result of her fall at defendant's retail store at Idaho Falls, Idaho, on the 26th of November, 1941. Thereafter, and on August 11, 1942, defendant filed its answer in the within case and trial was had thereupon on October 15, 1942, without a jury resulting in a judgment for plaintiffs in the sum of $1750.00 as general damages and $195.00 as special damages, which judgment was entered on October 28, 1942. Thereafter, and on the 22nd day of January, defendant filed its notice of appeal from said judgment. To this notice of appeal defendant attached a statement of points. (Tr. p. 66.)

The jurisdiction of this Court to hear the cause thus presented derives from Section 128 of the United States Judicial Code, 28 U.S.C.A. 225.

STATEMENT OF THE CASE.

Defendant operates in the City of Idaho Falls, Idaho, a retail store on Shoup Avenue in said city and state. On the 26th day of November, 1941, plaintiff entered defendant's store allegedly for the purpose of shopping. Shoup Avenue runs approximately north and south, and plaintiff wife entered defendant's store through the third door from the south. (Tr. p. 72.) After looking through the store for a half hour or

more, plaintiff wife left the store by the same door through which she had entered. (Tr. p. 73.)

As she went out of the door, upon her second step down the ramp, from said door, her feet slipped and she fell to the tile floor of the ramp and sat upon a spot of water. (Tr. p. 73.) The presence of the moisture was due to a cause or causes unknown, and the length of time for which the moisture had existed upon the ramp was not shown. Mrs. Lamberson, in falling sustained a fracture of the distal end of the right radius. (Tr. p. 121.) Plaintiffs filed action against defendant Montgomery Ward & Co. for damages for her injuries, and the case was tried to the Court, without a jury, on October 15, 1942, before the Honorable William Healy, United States Circuit Judge presiding. Plaintiffs were awarded a judgment against defendant in the sum of $1750.00 as and for general damages, and the sum of $195.00 as and for special damages.

SPECIFICATION OF ERRORS RELIED UPON.

(References to the portion of this brief which argues the specification are indicated in each instance.)

1.

That the Court erred in denying the motion of the defendant for an order requiring plaintiffs to make a more definite statement of their alleged cause of action referred to in defendant's motion as paragraph second and subparagraphs (a) and (b) for the reason

that the said complaint was uncertain, ambiguous and indefinite in the particulars described in the said sub-paragraphs of paragraph second and each of them. (Proposition I.)

2.

(1) The Court erred in finding that the defendant was negligent in allowing water to be and remain upon the ramp or entrance way without any sand or ashes or matting to cover the same. (Proposition II D.)

(2) The Court erred in finding that at the time of plaintiff wife's injury the ramp or entrance way was under the exclusive control of the defendant. (Proposition II F.)

(3) The Court erred in finding that the plaintiff Lydia Lamberson fell upon the ramp or entrance way as a proximate cause of the same being wet, and further that the same was wet due to defendant's negligence and the absence of ashes or sand or matting upon said ramp. (Proposition III.)

(4) The Court erred in finding that the plaintiff, Lydia Lamberson, was not contributorily negligent in passing out and over said ramp or entrance way and in her use thereof for egress from the store. (Proposition IV.)

(5) The Court erred in finding that the defendant did not give plaintiff, Lydia Lamberson, any warning or notice of water being upon said ramp or entrance way prior to or at the time of her passing out and over the same. (Proposition II E.)

(6) The Court erred in finding that the said ramp or entrance way was unsafe for patrons and persons using same because there were no ashes, sand or matting thereon. (Proposition II D.)

(7) The Court erred in admitting the testimony of Lydia Webb Theusen and Ethel Criddle regarding the presence of water on the ramp in question for the reason that it was not shown that said testimony was related to the time of the accident. (Proposition II B.)

3.

That the evidence is insufficient to support a finding that defendant was guilty of any negligence as charged in the complaint, or at all, for which reason the Court erred in making and entering its findings of fact, and conclusions of law and judgment in favor of the plaintiffs. (Proposition II.)

4.

That under the proofs submitted the only lawful judgment which could or should have been entered in said cause was a judgment in favor of the defendant and against the plaintiffs.

That the reasons for the foregoing statement of points are set forth as follows:

a. There was no proof that defendant had knowledge of the presence of water on the ramp or floor of the store entrance upon which plaintiff, Lydia Lamberson, alleged that she fell. (Proposition II B.)

b. There was no proof that there was water present on the ramp or floor of the entrance for a sufficient

length of time prior to the alleged fall of the plaintiff, Lydia Lamberson, to give or charge defendant with constructive notice thereof. (Proposition II C.)

c. The proof affirmatively shows that the presence of water on the ramp or floor of the entrance to the store as alleged by plaintiffs to have been present, was visible and obvious to the plaintiff Lydia Lamberson as she left said store, and thus she had full knowledge thereof. (Proposition II E.)

d. There was proof that plaintiff Lydia Lamberson was contributorily negligent in disregarding the dangers of an obvious condition of which she had knowledge and the defendant had none, and further that said plaintiff wife assumed any risk incident to her use of the ramp by stepping into a spot of water which she alleges was on said ramp or floor at the moment of her use. (Proposition IV.)

e. That the defendant was not an insurer of the safety of the plaintiff Lydia Lamberson as an invitee. (Proposition II A.)

5.

That the Court erred in awarding to the plaintiffs a lump sum of money for general damages without specifying what portion of the damages awarded was for permanent injuries alleged to have been sustained by the plaintiffs. (Proposition V.)

SUMMARY OF ARGUMENT.

We propose to show:

First, that the plaintiffs' complaint failed to properly allege any negligence on the part of defendant.

Second, that the record is devoid of any evidence which would support a finding that defendant violated any duty owing to the plaintiffs.

Third, that the plaintiffs failed to prove that the facts alleged as constituting negligence upon the part of defendant were the proximate cause of the accident.

Fourth, that the record shows that the plaintiff wife was guilty of contributory negligence which was the direct and proximate cause of the accident, and which bars her recovery.

Fifth, that the award for damages for permanent injuries is not supported by any evidence in the record.

ARGUMENT.

I.

IT WAS REVERSIBLE ERROR TO DENY DEFENDANT'S MOTION TO MAKE THE COMPLAINT MORE CERTAIN WHERE SAID COMPLAINT ALLEGED MERE LEGAL CONCLUSIONS, AND FAILED TO PLACE UPON RECORD THE SPECIFIC AND PARTICULAR FACTS WHICH PLAINTIFFS CLAIMED ENTITLED THEM TO RECOVER, SO THAT DEFENDANT MIGHT COME PREPARED TO MEET THEM.

(Arguing Specification of Error 1.)

Section 5-605 of the Idaho Code of Civil Procedure provides as follows:

> "5-605 Contents of Complaint: The Complaint must contain:
>
> * * * * * * *

2. A statement of the facts constituting the cause of action in ordinary and concise language."

Plaintiffs have stated their alleged cause of action based upon defendant's alleged negligence, as follows:

"IX.

That after being in said store for sometime shopping, the plaintiff, Lydia Lamberson, attempted to leave and depart through the same door which she entered; said third door from the south and the one through which plaintiff, Lydia Lamberson, entered and departed sloped up to the east from the sidewalk for a distance of approximately seven feet and the floor of the entrance to said door is hard tile and becomes very slick and slippery when wet; which is under the exclusive control of defendant.

X.

That at the time the plaintiff, Lydia Lamberson, entered said store of the defendant, through said third door from the south, said entrance from the sidewalk to the door, and the tile part hereinbefore mentioned, was dry and not slippery. That during the time that the said plaintiff, Lydia Lamberson, was in said store of the defendant, said defendant, through and by its agents, servants and employees, acting in the line, course, and scope of their employment, cast or threw considerable water upon said tile between the sidewalk and the said store door and wet the same, and that by reason thereof, the same was extremely slick and slippery; whereupon the plaintiff, Lydia Lamberson, attempted to depart through said third door from the south and upon approching said sloping tile, by reason of the same being wet,

> the plaintiff Lydia Lamberson's feet slipped out from under her and she fell with great force and violence and did then and there break her wrist and that by reason of said break said wrist is deformed and that she is permanently injured."

Defendant moved to make the statement of the plaintiffs' cause of action more definite on the ground that it could not be ascertained from said complaint whether the slope of the tile therein mentioned contributed to the alleged fall of the plaintiff Lydia Lamberson, or whether the alleged fall of the said plaintiff was caused only by the alleged presence of water on said tiling.

Said pleading does not fulfill the requirements of Section 5-605 of the Idaho Code of Civil Procedure, requiring that the facts constituting the cause of action be stated in ordinary and concise language, as interpreted by the Idaho decisions.

It has often been held that a general allegation of negligence is insufficient to withstand an attack on the ground of uncertainty.

King v. Oregon Short Line Railroad Co., 6 Idaho 306, 55 Pac. 665;

Crowley v. Croesus Gold & Copper Mining Co., 12 Ida. 530, 86 Pac. 536;

Younie v. Blackfoot Light & Water Co., 15 Ida. 56, 96 Pac. 193.

It is apparent from the above quoted portion of plaintiffs' complaint that it cannot be ascertained therefrom whether defendant is charged with negligence by reason of the fact that said ramp was slop-

ing, or by reason of the fact that said ramp was wet, or both. Such uncertainty must yield to a motion on the part of the defendant to make said complaint more certain, and it was clearly error to deny such motion.

Pullen v. City of Butte, 38 Montana 194, 99 Pac. 290;

Osborn v. Carey, 24 Idaho 158, 132 Pac. 967;

Stearns v. Grover, 61 Idaho 232, 99 Pac. (2d) 955.

II.

THE JUDGMENT CANNOT STAND BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT DEFENDANT:

A. HAD ACTUAL KNOWLEDGE OF THE EXISTENCE OF A DANGEROUS CONDITION UPON ITS PREMISES, OR

B. SHOULD HAVE KNOWN OF ITS EXISTENCE, BECAUSE OF THE PRESENCE OF A DANGEROUS CONDITION FOR A SUFFICIENT LENGTH OF TIME TO GIVE DEFENDANT CONSTRUCTIVE NOTICE THEREOF,

AND THAT DEFENDANT AFTER HAVING KNOWLEDGE OR NOTICE THEREOF FOR A SUFFICIENT LENGTH OF TIME, FAILED TO:

A. TAKE ADEQUATE STEPS TO CORRECT SUCH DANGEROUS CONDITION, OR

B. GIVE PLAINTIFF SUFFICIENT WARNING THEREOF.

(Arguing Specifications 2(1), 2(5), 2(6), 3, 4a, 4b, 4c, 4e.)

A. The nature of the obligation owed by an owner or occupant of land toward an invitee has been defined by case law in almost every jurisdiction with no appreciable disparity.

The authorities are almost entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication, invites or

induces others to go thereon or therein owes to such person a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils. The owner is not an insurer of such persons, even though he has invited them to enter.

20 RCL pp. 55-57, 66 *NEG* 32(1), 44;
Goldstein v. Healy, 187 Cal. 206, 201 Pac. 462;
Shanley v. American Olive Co., 185 Cal. 552, 197 Pac. 793;
Mautino v. Sutter Hospital Assn., 211 Cal. 556, 296 Pac. 76;
Blodgett v. B. H. Dyas Co., 4 Cal. (2d) 511, 50 Pac. (2d) 801;
J. C. Penney Co. v. Robinson, 128 Ohio St. 626, 193 N.E. 401, 100 A.L.R. 706-767;
Cooley on Torts, Vol. 2, p. 1259, 3rd Edition;
Sears Roebuck & Co. v. Peterson, 1935 (C.C.A. 8th), 76 F. (2d) 243;
Williamson v. Neitzel, 45 Ida. 39, 260 Pac. 689;
Pincock v. McCoy, 48 Ida. 227, 281 Pac. 371;
Hall v. Boise Payette Lbr. Co., 125 Pac. (2d) 311;
Carr v. Wallace Laundry Co., 31 Ida. 266, 170 Pac. 107;
Martin v. Brown, 56 Ida. 379, 54 Pac. (2d) 1157.

The duty cast upon an owner to an invitee is thus set forth as the duty to keep his premises in a "reasonably safe" condition.

When the Courts have said that an owner must keep his premises safe for use by an invitee they did not require of him a guaranty against any possible injury,

but only that he use ordinary care to keep his premises in a reasonably safe condition for use by an invitee.

Jones v. Bridges, 38 Cal. App. (2d) 341, 101 Pac. (2d) 91;

Brown v. Holzwasser, Inc., 108 Cal. App. 483, 291 Pac. 661;

Corbett v. Spanos, 37 Cal. App. 200, 173 Pac. 769;

Matherne v. Los Feliz Theatre (1942), 53 Cal. App. (2d) 660, 128 Pac. (2d) 59.

B. Furthermore, the indisputable rule of law is that no liability rests upon defendant for a dangerous condition unless he knew of it, or it had existed for a length of time sufficient to give him constructive notice.

The time-tested doctrine has been propounded by many decisions that in order to impose liability for injury to an invitee by reason of a dangerous condition of the premises, the condition must have been known to the owner or occupant, or have existed for such time that it was the duty of the owner to know of it.

F. W. Woolworth v. Williams (1930), 59 App. D.C. 347, 41 Fed. (2d) 970;

Newell v. K. & D. Jewelry Co. (1935), 119 Conn. 332, 176 Atl. 405;

Bennett v. Louisville, etc. R. Co., 102 U. S. 577, 26 L. Ed. 235;

Shanley v. American Olive Co., 185 Cal. 552, 197 Pac. 793;

Southern Paramount Pictures Co. v. Gaulding, 24 Ga. A. 478, 101 S.E. 311;

Calvert v. Springfield Electric Light Co., 231 Ill. 290, 83 N.E. 184, 14 L.R.A. N.S. 782, 12 Ann. Cas. 423;

Weber v. City Water Co., 206 Ill. App. 417;

Mellish v. Thorne, 150 Ill. App. 237;

Chapin v. Walsh, 37 Ill. App. 526;

Cleveland, etc. R. Co. v. Means, 59 Ind. App. 383, 104 N.E. 785, 108 N.E. 375;

Wilmer v. Chicago Gr. W. R. Co., 175 Iowa 101, 156 N.W. 877, L.R.A. 1917F 1024;

Louisville etc. R. Co. v. Page, 203 Ky. 755, 263 S.W. 20;

Gosney v. Louisville etc. R. Co., 169 Ky. 323, 183 S.W. 538, L.R.A. 1916E 458;

Patten v. Bartlett, 111 Me. 409, 89 Atl. 375, 49 L.R.A. N.S. 1120;

Smith v. New England Cotton Yarn Co., 225 Mass. 287, 114 N.E. 353;

Shaw v. Ogden, 214 Mass. 475, 102 N.E. 61;

Davis v. Central Cong. Society, 129 Mass. 367, 37 Am. R. 368;

Carleton v. Franconia Iron Co., 99 Mass. 216;

Lindsley v. Stern, 203 App. Div. 615, 197 N.Y.S. 106;

Sullivan v. N.Y. Tel. Co., 157 App. Div. 642, 142 N.Y.S. 735;

De Negro v. Christman, 77 Misc. 147, 136 N.Y.S. 364;

Taudte v. Snellenburg (D. C. ED. Pa.), 34 F. Supp. 115.

In an abortive effort to show that defendant had actual knowledge of the presence of water upon the

ramp, plaintiffs introduced, over defendant's objection, the testimony of Mrs. Lydia Webb Theusen and Ethel Criddle (Tr. pp. 104, 116, 117) that one of defendant's servants was seen sweeping water away from the ramp. However, they both admitted that this activity took place after the accident had happened. The impropriety of admitting evidence of acts taken to correct a situation after an accident has happened, as well as the impropriety of admitting testimony regarding the condition of the premises at a time not related to the accident is well founded in our law. It was clearly reversible error for the Court to admit said testimony.

Great Atlantic & Pacific Tea Co. v. Lray (C.C.A. 6), 71 Fed. (2d) 396;
Lyle v. Mezerle, 220 Ky. 227, 109 S.W. (2d) 598.

C. There is not the slightest trace of any evidence that defendant had actual knowledge of the presence of water on the ramp. Therefore, if plaintiffs' judgment is to be sustained herein, it must be upon the ground that the water in question had remained upon said ramp for a period of time long enough to have given defendant constructive notice thereof. There is no evidence, however, upon the essential fact of how long the spot of water had remained upon the ramp or entry way.

It is submitted that judgment for plaintiffs cannot be upheld because of the complete absence of any evidence that the spot of water had remained upon the ramp for sufficient time to give defendant constructive notice thereof. The authority therefor has been expounded in many jurisdictions.

In *Campbell v. F. W. Woolworth Co.,* 117 Fed. (2d) 152, a very similar situation to the instant case was

presented. In that case the plaintiff slipped on a spot of tobacco juice on the tile floor of defendant's entry way as she departed from the store. There was no evidence of how long said spot had remained upon the floor. The Appellate Court affirmed a judgment for the defendant after trial without a jury. Although the spot was reported as dried around the edges, the Appellate Court held that the trial Court could not speculate from this, the length of time which said spot had remained on the floor, therefrom, saying:

> "There is no evidence upon which the Court could have based an estimate of the length of time that the slippery spot remained in the entry way prior to the accident. It may be true as plaintiff argues, that a Court may take judicial notice that time was required for the substance to reach a dried condition around the edges. The Court should not speculate, however, on the length of time necessary for it to achieve this condition. The Court did not err in sustaining defendant's motion for judgment."

In the case of *Crawford v. Pacific States Savings & Loan Co.*, 22 Cal. App. (2d) 448, 71 P. (2d) 333, the plaintiff, an invitee in defendant's hotel, alleged his fall was caused by slipping on water on the floor of defendant's lavatory. The Appellate Court reversed a judgment for plaintiff, and in its opinion said in part:

> "Contention of defendant is that judgment must be reversed for the reason that there is no evidence that defendant had actual knowledge of the said condition, or that the condition complained of has existed for so long a time that defendant is charged with notice of its existence.

We find no such evidence in the record, nor is there any evidence to show how the water got on the floor."

"The burden of proving the negligence of a storekeeper toward a customer is upon the customer. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant."

F. W. Woolworth Co. v. Williams (1930), 59 App. D.C. 347, 41 F. (2d) 970.

And to like effect:

Scannell v. Makison Market (1932), 131 Me. 495, 160 Atl. 777;

Sears, Roebuck & Co. v. Johnson (1937), C.C.A. 10th, 91 F. (2d) 332.

It is clearly prejudicial error for the Court to assume without any proof that defendant had knowledge or notice of a dangerous condition on its premises.

Brown v. S. H. Kress Co. (1941), C.A.A. Ga., 17 S.E. 758.

In *Gordon v. McIntosh* (1932, Tex. Civ. App.), 54 S.W. (2d) 177, the Appellate Court reversed a judgment for the plaintiff because the trial Court's instructions assumed the defendant's knowledge of a dangerous condition of its premises, a fact which was in controversy, saying that the defendants "were not required to keep the aisle or entrance way to the store

in an absolutely safe condition for the plaintiff and the public, but were required to exercise ordinary care to keep it in a reasonably safe condition." In this case the complaint of the plaintiff alleged that plaintiff's injuries resulted from slipping and falling on the ten-foot tile entrance way to the defendant's store which had been allowed to become slippery and dangerous from moisture.

In the *Lamberson* case, the defendant's contention is that the presence of water upon the ramp if any was due to snow accumulating upon the awnings and dropping upon the ramp during a thaw. (Tr. p. 131.) There is no evidence to contradict this theory of defendant, and no explanation on the part of plaintiff for the existence of said water on the ramp. It is not only unreasonable and unjust, but unconscionable to predicate defendant's liability upon circumstances created by the forces of nature, unless defendant had knowledge thereof and ample opportunity to correct such situation.

> "The owner of a store must take reasonable care that his customers shall not be exposed to danger of injury through conditions in the store or at the entrance which he invites the public to use. He cannot prevent some water and mud being brought into an entrance way on a rainy day, and he is not responsible for injuries caused thereby unless it is shown that the construction of the store is inherently dangerous or that he failed to use care to remedy conditions which had become dangerous after actual or constructive notice of such conditions. That has not been shown here."
>
> *Miller v. Gimbel Bros.* (1933), 262 N.Y. 107, 186 N.E. 410.

In the above case, the Court reversed a judgment for the plaintiff and dismissed the complaint where it appeared that plaintiff sustained the injuries complained of by slipping and falling in entering the defendant's department store through the revolving door, the short marble entrance was wet with the day's rainfall, and that some mud was in a corner of the revolving door.

In *Murray v. Bedell Co.* (1930), 256 Ill. App. 247, a proprietor of a store was held not liable to a customer who on a rainy day, slipped and fell on the properly constructed marble tile floor of the store's open vestibule, which though cleaned twice that day, was covered with mud and water, when it was shown that the slippery condition was one customarily found on rainy days in vestibules of this character, and on the sidewalks and premises surrounding public places.

In *Suran v. Lustic Shoe Store* (1933), 14 Ohio L. Abs. 590, where it appeared that the marble floor of the vestibule to the defendant's store, where the plaintiff slipped and fell, sustaining injuries, was slippery from some tracked-in snow that had melted, and where there was no evidence tending to show that the defendant knew or should have known of the condition, the Court held in affirming a judgment for the defendant, that the evidence would not justify a conclusion that the condition of the floor was dangerous to the extent of creating liability therefor under the circumstances.

In *Antibus v. W. T. Grant Co.,* 297 Ill. App. 363, 17 N.E. (2d) 610, plaintiff testified that he did not

see a banana peeling upon defendant's stairs when he descended. He was in the basement for 25 to 30 minutes and did not see anyone use the stairs during that time, although his back was toward the stairs and he was shopping. Upon his ascending said stairs he slipped and was injured. The Court on appeal reversed the lower Court's denial of defendant's motion for a directed verdict, saying,

> "* * * It is entirely possible that the peeling may have been thrown down the stairway by some person near the railing at the top, or have gotten there in some manner unexplained by the evidence. There is no testimony that it was there for any particular period of time prior to the accident, and there is certainly nothing reasonably tending to prove that it was on the steps sufficiently long to charge defendant with knowledge of its presence. Where such is true plaintiff fails to establish one of the essentials of his right to recover, and the trial court should direct a verdict for the defendant. *Goddard v. Boston & Maine R. Co.*, 179 Mass. 52, 60 N.E. 486; *De Velin v. Swanson, et al.* (R. I.), 72 Atl. 388."

In *Tariff v. S. S. Kresge Co.* (S.J.C. Mass. 1937), 12 N.E. (2d) 79, where plaintiff had slipped on a puddle of water close to the entrance of defendant's store, and it was not shown how long the puddle had remained at said entrance, it was held that there was no evidence to support a finding of defendant's negligence, even though the puddle was described as dirty in appearance, reddish in color, one foot wide and drying along the edge.

In the case at bar, plaintiffs unquestionably had the burden of proof to establish that defendant or its servants had knowledge of the presence of water upon the ramp or that such water had remained thereon for a length of time sufficient to give defendant constructive notice thereof, and unless this burden of proof has been carried by the plaintiffs, recovery cannot be allowed.

Powell v. L. Feibleman & Co. (La. App. 1939), 188 So. 130.

Not only did plaintiffs fail to sustain the burden of proof herein, but utterly failed to introduce *any* evidence on this essential question. Reason and authority compel two conclusions, that a judgment for the plaintiffs is not supported by the evidence, and that a reversal is required. Surmise, conjecture and speculation cannot supply what is lacking in the proof essential to the plaintiffs' case.

Montgomery Ward & Co. v. Hansen, 282 Ky. 188, 138 S.W. (2d) 357;

McKeeghan v. Kline's Inc. (Mo. 1936), 98 S.W. (2d) 555.

Defendant offers, as impelling authority herein, the case of *Matherne v. Los Feliz Theatre* (1942), 53 Cal. App. (2d) 660, 128 Pac. (2d) 59, which is so closely analogous to the instant case as to be on all fours therewith. In *Matherne v. Los Feliz Theatre,* plaintiff had fallen upon the sloping terrazzo lobby of defendant's theatre, because of the presence of water thereon. It had been raining at the time of the accident, and some water had seeped through a crack in the marquee of

the theatre and dripped upon the floor of the lobby. Granting a judgment for defendant notwithstanding a verdict for plaintiff, the Court said:

> "It does not appear, however, in viewing the evidence in such manner, that defendants knew at the time of this incident or prior thereto or at all that water dripped from the ceiling onto the floor inside the lobby, or dripped from the ceiling at all. It further does not appear that water dripped from said ceiling onto the floor of the lobby for such a length of time that defendants or any of them should have known in the exercise of ordinary care of such condition; or if they were chargeable with such constructive knowledge of such dripping of water, that they had a reasonable time before plaintiff fell within which to repair such condition or otherwise protect or give adequate warning to persons using the entrance.
>
> * * * The burden was upon plaintiffs to show that defendants had actual or constructive knowledge of a dangerous condition of the premises which proximately caused the accident (Civil Code, Section 1981; *Gabriel v. Bank of Italy* (1928), 204 Cal. 244, 267 Pac. 544, 58 ALR 1039), and that such knowledge existed for a sufficient length of time that defendants had a reasonable opportunity to correct the condition or warn its patrons. (*Gold v. Arizona Realty Co.* (1936), 12 Cal. App. (2d) 676, 55 Pac. (2d) 1254.)"

We submit that the facts of the case at bar present even a stronger case for defendant than in the *Matherne* case for the reason that no defect of any kind is shown by the evidence, and the reason for the presence of the water upon the ramp was not sus-

ceptible to exact explanation, and clearly not chargeable to defendant.

The facts of the *Lamberson* case and the foregoing authorities compel the conclusion that the plaintiffs' judgment cannot stand because of failure of proof of:

(1) Actual knowledge of the presence of water on the ramp by the defendant, or,

(2) Existence of the water for a sufficient length of time to give defendant constructive notice thereof.

D. There was no duty upon defendant to place sand, ashes, or matting upon the ramp, because defendant had no actual knowledge or constructive notice of any dangerous condition on its premises.

(Arguing Specification of Error 2(1).)

The entire record is utterly devoid of any evidence to support the finding of the Court that defendant was negligent in this respect for:

A. There is no duty upon defendant to put sand or ashes on the ramp, and

B. There is no showing that if sand or ashes had been placed upon said ramp, that said ramp would not have been slippery, or that Mrs. Lamberson's fall would have been thereby prevented.

To predicate defendant's negligence upon the failure to place sand, ashes or matting upon the ramp, without finding that defendant knew of a dangerous condition thereon, and had reasonable opportunity to remedy it thereby is to place too great a burden upon the defendant, and one not required by law.

Smith v. Sears, Roebuck & Co. (Mo. App. 1935), 84 S.W. (2d) 414.

It was not within the power of the trial judge to speculate as to whether said ramp would not have been slippery or dangerous or that defendant would have fulfilled its duty owing to the plaintiff by the placing of sand or ashes upon said ramp. No finding of negligence can be founded upon any such *hypothetical* facts. The Court is empowered only to consider the actual facts, i.e. to consider the condition of the ramp as described by the witnesses, and to determine as a fact, whether the condition was one which afforded reasonable safety to defendant's patrons, or in other words, whether defendant had exercised ordinary care with respect to the condition of the ramp.

Nicola v. Pacific Gas & Electric Co., 50 Cal. App. (2d) 612, 123 Pac. (2d) 529;

J. C. Penney, Inc. v. Kellermeyer (1939), Ind. App. 19 N.E. (2d) 882.

Furthermore, there is not one scintilla of evidence in the record that by placing sand, ashes, or matting on the said ramp, that a slippery condition if any existed, would have been eliminated, or that Mrs. Lamberson's fall would have been prevented thereby. There is no evidence whatsoever, in the record, of any custom or general practice among the property owners of Idaho Falls to place sand, ashes or matting on their ramps, and therefore no evidence before the Court that the duty owing to plaintiffs by defendant required the placing of any ashes, sand, or matting upon said ramp. The finding that defendant was negligent in not so doing is clearly a finding based upon speculation and wholly without support by any evidence in the record.

To determine that defendant was required to place sand, ashes, or a matting upon the ramp in order to fulfill its duty of due care is to enter the field of conjecture, guess, and speculation.

Gold v. Arizona Realty & Mortgage Co., 12 Cal. App. (2d) 676, 55 Pac. (2d) 1254.

The finding that defendant was negligent in not placing sand, ashes, or matting upon said ramp, presupposes that defendant had knowledge of a dangerous condition existing upon said ramp. Such presupposition is without the slightest foundation in either the pleadings or the proof. Not only is there no evidence whatsoever that defendant had knowledge of a dangerous condition upon its premises which was not obvious to plaintiff, but there is no evidence that a dangerous condition if any, existed for a sufficient length of time to give the defendant constructive notice.

E. There was no duty upon the defendant to warn plaintiff wife of danger, or to place sand, ashes, or matting upon the ramp, where the dangerous condition was open, obvious and readily apparent to the plaintiff wife.

(Arguing Specifications of Error 2(1), 2(5), 2(6), 3, 4a, 4b, 4c.)

In this case the plaintiffs have offered no explanation of the presence of the water upon the premises. The only explanation is the undisputed one offered by the defendant that the weather was thawing, and that a patch of snow had fallen from the box protecting the awning to the sidewalk around the corner of the window where plaintiff had fallen. (Tr. p. 131.)

The duty to warn an invitee of dangerous conditions on the premises applies only to hidden defects and dangers and not to open and obvious defects such as a spot of water upon a ramp or sidewalk.

Lamson v. Sessions Bolt Co., 234 Ala. 60, 173 So. 388;

Geis v. Tennessee Coal, Iron & R. R. Co., 143 Ala. 299, 39 So. 301;

Farmers & Merchants Warehouse Co. v. Perry, 218 Ala. 223, 118 So. 406.

Even if all of the evidence in the record be construed in a light most favorable to the plaintiffs, plaintiffs fail to show any negligence on the part of defendant, for there was no allegation in the complaint and no evidence in the record that there was anything about defendant's premises of a dangerous nature that was not entirely obvious and as well within the knowledge of plaintiff wife as defendant.

The proper rule for application in the instant case where an invitee is injured upon the premises of the property owner, has been reiterated innumerable times in many recent cases.

> "The owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier, merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property.

It is when the perilous instrumentality is known to the owner or occupant and not to the person injured that a recovery is permitted. There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant."

Mautino v. Sutter Hospital Assn., supra;

20 *R. C. L.* pp. 55-57;

Touhy v. Owl Drug Co., 6 Cal. App. (2d) 64, 44 Pac. (2d) 405;

Martin v. Brown, 56 Ida. 379, 54 Pac. (2d) 1157;

Batson v. Western Union Tel. Co. (C. C. A. 5th), 75 Fed. (2d) 154;

Pinehurst Co. v. Phelps, 163 Md. 68, 160 Atl. 736;

Donaldson v. Wilson, 60 Mich. 86, 26 N. W. 842, 1 Am. St. Rep. 487;

Englebardt v. Philipps, 136 Ohio St. 73, 23 N. E. (2d) 829;

Ill. Cent. R. Co. v. Nichols, 173 Tenn. 602, 118 S. W. (2d) 213;

McAfee v. Travis Gas Corp. (Tex. Civ. App.), 131 S. W. (2d) 139;

Lowe v. Salt Lake City, 13 Utah 91, 44 Pac. 1050, 57 Am. St. Rep. 708;

Dingman v. A. F. Mattock Co., 15 Cal. (2d) 622, 96 Pac. (2d) 821;

Lary v. Cleveland C. C. & J. R. Co., 78 Ind. 323, 41 Am. Rep. 572;

Jones v. Swatzel, 145 Kan. 99, 64 Pac. (2d) 555;

Gordon v. Maryland State Fair, 174 Mo. 466, 199 Atl. 519;

Hoyt v. Woodbury, 200 Mass. 343, 86 N. E. 772, 22 L. R. A. N. S. 730;

Paubel v. Hitz, 339 Mo. 274, 96 S. W. (2d) 369;

Vogt v. Wurmb, 318 Mo. 471, 300 S. W. 278;

Britz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504;

Texas & Pac. R. Co. v. Howell (Tex. Civ. App.), 117 S. W. (2d) 857.

F. The doctrine of res ipsa loquitur does not apply to the within case.

(Arguing Specification of Error 2(2).)

The Court by finding that the ramp in question was under the exclusive control of the defendant at the time of the injury apparently attempted to apply the doctrine of *res ipsa loquitur* to the within case. An examination of the facts as well as the authorities will indicate that there is no justification for the finding of exclusive control, and consequently no justification for the application of the doctrine of *res ipsa loquitur.*

It has been set down by many cases that the doctrine of *res ipsa loquitur* does not apply to situations in which an invitee falls upon a storekeeper's premises.

Dickey v. Boggs, 345 Pa. 453, 29 Atl. (2d) 1;

Pratt v. Great Atlantic & Pacific Tea Co., 218 N. C. 732, 12 S. E. (2d) 242;

F. W. Woolworth Co. v. Ney, 239 Ala. 233, 194 So. 667;

Dalton v. Steiden Stores, 277 Ky. 179, 126 S. W. (2d) 155;

Powell v. L. Feibleman & Co. (La. App.), 187 So. 130;

Thompson v. Giant Tiger Corporation of Camden, 118 N. J. Law 10, 189 Atl. 649;

Fox v. Great Atlantic & Pacific Tea Co., 209 N. C. 115, 182 S. E. 662;

Bauson v. Western Union Tel. Co. (C. C. A. Fla. 1935), 75 Fed. (2d) 154;

F. W. Woolworth v. Williams, 59 App. D. C. 347, 41 Fed. (2d) 970;

Wildman v. Consolidated Gas, Electric, Light & Power Co., 158 Md. 39, 148 Atl. 270;

Taylor v. Roth & Co., 102 N. J. Law 702, 133 Atl. 386;

Coyne v. Mutual Grocery Co., 116 N. J. Law 36, 181 Atl. 314;

Bowden v. S. H. Kress Co., 198 N. C. 559, 152 S. E. 625;

Parker v. Great Atlantic & Pacific Tea Co., 201 N. C. 691, 161 S. E. 209;

J. C. Penney Co. v. Robison, 128 Ohio St. 626, 193 N. E. 401, 100 A. L. R. 705;

Markman v. Fred P. Bell Stores, 285 Pa. 378, 132 Atl. 178, 43 A. L. R. 862;

Dimarco v. Cupp Grocery Co., 88 Pa. Super. 449;

Tenbrink v. F. W. Woolworth Co., 153 Atl. 245.

The ramp in question was an area composed of tile that gave access to the doorway of defendant's store

from the public sidewalk. At the time of plaintiff's accident, and for some time prior thereto, it had been used and traversed by a considerable number of customers, other than Mrs. Lydia Lamberson, any of whom could have spilled water upon the ramp or tracked it in from the street. It was also subject and open to use by various members of the public, who in passing by the defendant's store, might be inclined to stop on the ramp and look through the windows at merchandise displayed inside. Moreover it was open to the forces and elements of weather, and subject to the falling snow which might be swept thereon by the wind or fall from the awnings.

There is no sound basis therefore, and no evidence in the record to support the finding that said ramp was under the exclusive control of defendant.

Such finding of exclusive control therefore cannot be predicated upon a complete absence of evidence. Whether or not there is exclusive control of said ramp on the part of defendant was a burden upon plaintiffs to affirmatively prove.

Mosson v. Liberty Fast Freight, 124 Fed. (2d) 448, bottom col. 1, p. 450.

Not only is the record utterly devoid of any proof of exclusive control of said ramp upon the part of defendant but common sense dictates a conclusion to the contrary.

Not only is there no basis for the finding that said ramp was under the exclusive control of defendant,

but there should have been no occasion for such finding, even if it had been supported by evidence in the record.

Said finding of exclusive control is relevant only when the doctrine of *res ipsa loquitur* is to be applied. Are we to conclude from this finding that the Court herein applied the doctrine? In the absence of a showing of any negligence on the part of defendant, that can be the only conclusion.

The rule is clearly established however and too well embodied in our law to now challenge or modify it, that the doctrine of *res ipsa loquitur* does not apply to injuries resulting from slipping or falling occasioned by the presence of a slippery substance upon the floor of a store.

Bowden v. S. H. Kress Co. (1930), 198 N. C. 559, 152 S. E. 625;

Parker v. Great Atlantic & Pacific Tea Co. (1931), 201 N. C. 691, 161 S. E. 209;

Tenbrink v. F. W. Woolworth Co. (1931) (R. I.), 153 Atl. 245;

Garland v. Furst, 93 N. J. Law 127, 107 Atl. 38, 5 A. L. R. 275;

Pinney v. Hall, 156 Mass. 225, 30 N. E. 1016;

Spickernagle v. Woolworth, 236 Pa. 496, 84 Atl. 909, Ann. Cas. 1914A 132;

Hathaway v. Chandler, 229 Mass. 92, 118 N. E. 273;

Rosen-Steinsitz v. Wanamaker (Sup.), 154 N. Y. S. 262;

Olson v. Whittborne, 203 Cal. 206, 263 Pac. 518, 58 A. L. R. 129;

Walker v. Grand Stores, 137 Atl. 563, 5 N. J. Misc. 541;

Bornstein v. White, 259 Mass. 34, 155 N. E. 661.

III.

PLAINTIFFS' JUDGMENT CANNOT STAND BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT ANY ACT OF NEGLIGENCE UPON THE PART OF DEFENDANT WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

(Arguing Specification of Error 2(3).)

The District Court, per Honorable William Healy, acting district judge, made certain findings as follows (Tr. p. 23): "That when the plaintiff Lydia Lamberson attempted to leave the store and pass over said ramp or entrance way, as a proximate cause of the same being wet, it was due to defendant's negligence, and the absence of any ashes or sand or matting on said ramp or entrance way, she slipped and fell onto the ramp or entrance way, and as a result of said fall, broke both bones in her right forearm near the wrist, and by reason thereof she sustained some permanent disability."

Although this finding is somewhat resistant to accurate interpretation, defendant advances as a fair statement of the content of said paragraph, that the Court found either in the conjunctive or the alternative that the proximate causes of the accident were (a) the

ramp being wet and/or (b) the absence of any ashes, sand or matting on the ramp.

In support of alternative (a) above we have only the following statements in the record (Tr. p. 73):

> "Q. Did anything occur when you left the store?
>
> A. I had to open the door and as I stepped out, I took about the second step and I slipped. I seen water in the doorway as I went down. It took both my feet from under me and in order to save my hip from being broken I fell on my wrist and I broke my wrist."

Mrs. Lamberson, upon cross-examination, gave a further statement on page 85 of the transcript to the same effect:

> "Q. As you left the store when did you first observe any water in the entrance or the vestibule?
>
> A. I went out the door and took a couple of steps and slipped. I seen the water at that time."

These are the only explanations of the accident contained in the record. We respectfully direct the Court's attention to the fact that *Mrs. Lamberson did not say that she slipped on the water.* She did not describe the appearance, the extent or the position of the spot of water. She did not state that she stepped in the water before she fell, but only stated that she sat down in it after she fell. (Tr. p. 85.)

The ramp ran from the sidewalk to the store door and was seven feet in depth. (Tr. p. 134.) Because of the absence of any testimony that the spot of water

caused Mrs. Lamberson to slip, and because of the area of the ramp, it is reasonable to infer that a spot of water of the size vaguely described by Mrs. Lamberson (Tr. p. 85) could have been present upon the ramp without causing her to slip. It may have been in front or in back of her, or on either side, and still she could have slipped for a cause unknown, and sat upon the spot of water.

In the absence of evidence on the point, the trier of the facts was required to *infer* that Mrs. Lamberson slipped *upon* the water from her statement that she slipped and *sat* upon the water. (Tr. pp. 73, 85.)

Mrs. Lamberson also testified that when she left the store she "cut the corner pretty close" (Tr. p. 74) which suggests that her exit was made hastily. It is just as reasonable to infer that her slipping was due to her haste, or to the fact that she cut the corner, or the fact that she was close to the window (Tr. p. 74) and perhaps was off balance by reason thereof.

The Court therefore in making its finding that the plaintiff wife slipped as a proximate cause of the ramp being wet, necessarily had to balance and weigh these various inferences that may be drawn from the facts, and choose one inference as against another equally probable one. Such practice is beyond the scope of the Court's function, and such a finding based upon inference cannot stand.

In support of alternative (b) of the above there is not the faintest shred of evidence in the record. No evidence of any custom or general practice to place

ashes, sand or mattings upon store entrances was introduced, and no evidence that a wet or slippery condition upon said ramp would have been ameliorated or eliminated by so doing. This portion of the finding, therefore, is also palpably unsupportable by anything in the record.

From the foregoing it is apparent that plaintiffs did not carry the burden of proof of showing what specific alleged act of negligence was the proximate cause of Mrs. Lamberson's fall. And the fact that the Court might have *inferred* that the fall was caused by the presence of water upon the ramp or the absence of ashes, sand or matting thereon, rather than to the fact that Mrs. Lamberson "cut the corner pretty close" in making her exit, or to some other circumstance, does not enable this finding to stand.

> "The burden is upon the plaintiff in an action for damages for personal injuries alleged to have been caused by defendant's negligence, to prove affirmatively the negligence alleged and that it caused the injury. *Benedict v. Potts,* 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478. That burden is not met by proof furnished by plaintiff that defendant's negligence *may* have caused the injuries, or even that it *probably* did cause it, if it also appears from the same source, that the injuries may have been produced by some other cause for which he was not responsible." (Italics added.)
>
> *Moore v. Am. Stores, Co.* (Md. App.), 182 Atl. 436;
>
> *County Commissioners of Harforth County v. Wise,* 75 Md. 38, 23 Atl. 65;

Strasburger v. Vogel, 103 Md. 85, 63 Atl. 202;
Darby Candy Co. v. Hoffburgs, 111 Md. 84, 73 Atl. 565;
Hanrahan v. Baltimore, 114 Md. 517, 80 Atl. 312.

IV.

THE JUDGMENT FOR PLAINTIFFS MUST BE REVERSED FOR THE REASON THAT THE EVIDENCE SHOWS THAT PLAINTIFF WIFE WAS GUILTY OF NEGLIGENCE WHICH PROXIMATELY CONTRIBUTED TO THE ACCIDENT.

The evidence indicates that the spot of water was located upon defendant's ramp, about two paces from the front door. (Tr. p. 73.) The sun was shining (Tr. p. 85) and there was evidently adequate lighting in the region of the ramp. Mrs. Lamberson expressed the belief that the tile of the ramp was "slick". (Tr. p. 74.) When she went into the store, she observed the condition of the ramp and that it was dry. (Tr. pp. 74, 85.) There is nothing in the record to indicate that the presence of water upon the ramp was not an open, obvious, and apparent condition which was readily observable by plaintiff wife. The fact that Mrs. Lamberson observed that the ramp was dry when she went into defendant's store, *ipso facto* shows that if she had exercised the same care in going out of the store, she would have observed that the tile was wet. Although the entrance to the store was rather wide, the fact that she "cut the corner (of the ramp) pretty close" suggests that her exit was made with some haste. The presence of water was plain to see (Tr. p.

85), for there was enough water to get her coat "good and wet", but she failed to look at it, or failed to see it if she did look at it and was therefore guilty of contributory negligence proximately contributing to the accident and precluding her recovery of damages for her injuries.

> "While it is true that the proprietor of a place of business is under a legal obligation to exercise reasonable and ordinary care to see that its premises can be used with reasonable safety by those who are invited to come thereon, this does not relieve a licensee or invitee from the duty of using a like degree of care for his own safety."
>
> *Hammer v. Liberty Baking Co.* (1935), 220 Iowa 229, 260 N. W. 720;
>
> *Shorkey v. Great Atlantic & Pacific Tea Co.* (1932), 259 Mich. 450, 243 N. W. 257;
>
> *Bilger v. Great Atlantic & Pacific Tea Co.* (1934), 360 Pa. 540, 175 Atl. 496.

It has been held that there is evidence of negligence where a customer upon going out of a store, fails to see ice or snow upon the sidewalk or ramp leading to the doorway of said store.

> *Great Atlantic & Pacific Tea Co. v. Chapman,* 72 Fed. (2d) 112 (C. C. A. 6);
>
> *Kass v. Glatzle* (1929), 7 N. J. L. Mis. R. 1006, 147 Atl. 652.

It is clearly negligence on the part of a plaintiff to fail to see an obvious danger.

> *Smith v. Rexburg,* 24 Ida. 176.

Because of the unique character of store entrances and their difference in composition and structure from that of the adjacent sidewalk, and store floor, a higher degree of caution and care is required of customers in such areas.

In *Buttler v. Willan* (La. App. 1940), 195 So. 663, defendant storekeeper was held not to be liable on the ground of negligence for injuries sustained by plaintiff who slipped and fell on tile flooring in the arcade at the store entrance, due to the accumulation of water from a recent rain. The Court said at page 665:

> "Had she been inside the store and while walking down an aisle encountered a wet and slippery floor, we do not think that it should be presumed that she would have thought it necessary to pay any attention to the floor. But on the outside of the store proper which might from its very nature become wet from rain, especially if accompanied by much wind from the side next to Washington Street where she entered, together with the further fact that the flooring of the arcade being of smoother surface than the ordinary concrete sidewalk—she knowing this from experience, mature judgment and observation of such places—we think that unless she paid some attention to where she was walking, she would be negligent herself such as to bar recovery."

No contention is made by plaintiffs that the presence of water upon the ramp was not an open and obvious condition. Nor is any contention made that there was anything about the structure of the premises or the lighting condition in the area of the ramp, that

would prevent the water upon it from being an obvious and readily apparent condition, and visible to plaintiff wife if she had looked where she was stepping.

Plaintiff, Lydia Lamberson, was clearly guilty of contributory negligence in failing to look where she was walking or stepping at the time she fell, or in failing to see the water if she did look.

Iden v. Zeeman Clothing Co., 50 Cal. App. (2d) 111, 122 Pac. (2d) 626;

Wills v. J. J. Newberry Co., 43 Cal. App. (2d) 595, 111 Pac. (2d) 346.

In this latter case it was said:

"It is as much negligence to fail to see that which can be observed by the exercise of ordinary care, as it is negligence not to look at all."

Several other cases have recited the well-established rule applicable herein that an invitee has a duty to look where she is going and of seeing that which is in plain sight and that if she fails so to do she is guilty of negligence.

Jones v. Bridges, 38 Cal. App. (2d) 341, 101 Pac. (2d) 91;

Blodgett v. B. H. Dyas Co., 4 Cal. (2d) 511, 50 Pac. (2d) 801.

V.

PLAINTIFFS' LUMP SUM JUDGMENT FOR DAMAGES FOR PERMANENT INJURIES CANNOT STAND FOR THE REASONS THAT (1) THE PLAINTIFFS DID NOT PRODUCE ANY EXPERT MEDICAL TESTIMONY IN SUPPORT OF PERMANENT INJURIES, AND (2) THE COURT DID NOT DEDUCT FROM THE JUDGMENT ANY SUM REPRESENTING COMPENSATION FOR DISABILITY DUE TO A CHRONIC CONDITION ANTEDATING THE ACCIDENT FOR WHICH DEFENDANT IS NOT CHARGEABLE OR LIABLE IN LAW.

(Arguing Specification of Error 5.)

Mrs. Lamberson testified descriptively of her own injuries and disability, that she sustained a broken arm as a result of the fall (Tr. p. 77); that she had a cast on her arm for five weeks (Tr. p. 78); that she was confined to bed for two weeks (Tr. p. 78); that she suffered pain during this time (Tr. p. 79); and that she still suffered pain. (Tr. p. 80.) She further asserted that she was unable to do her house work and was confined to her home for three and one-half months (Tr. p. 79); that her grip at the present time was very poor (Tr. p. 80); and that her arm was deformed (Tr. p. 80); and that she lost sales estimated to net her $60.00 per month for three months. (Tr. pp. 82, 83.) Mrs. Lamberson produced no medical testimony whatsoever in support of her contention that she sustained permanent injuries as a result of her fall.

Dr. Clifford M. Cline provided the only expert medical testimony upon Mrs. Lamberson's condition. He testified as a witness for defendant that he made an examination of Mrs. Lamberson's arm on June 24,

1942 (Tr. p. 119) discovering a fracture of the distal end of the radius, the styloid process. (Tr. p. 121.) Upon X-raying the arm he found the condition of the fragments to be excellent (Tr. p. 122), but observed some swelling of the wrist and some deformity thereof. (Tr. p. 122.) At that time he also noted arthritic changes in the hands and wrist joints of both hands. (Tr. p. 122.) At the time of the trial (October 15, 1942) the deformity of the wrist was the same as on June 24, 1942, the swelling was less, she had more motion in the fingers, and the evidence of arthritic changes was the same. (Tr. p. 122.) Dr. Cline testified that Mrs. Lamberson's arthritis was a definite factor in causing immobility of the wrist and fingers (Tr. p. 123), and that Mrs. Lamberson gave a history of pre-existing arthritis in the hands and wrist. (Tr. pp. 125, 126.)

There is no testimony or evidence in the record to show that Mrs. Lamberson's disability at the present time is permanent in character, and no evidence to show that she would not experience improvement in the future, nor is there any evidence to establish the extent, if any, of permanent disability Mrs. Lamberson had experienced.

There are clearly matters for expert testimony and not susceptible of definition by lay witnesses.

Based upon lay testimony, none of which was directed to nor competent to establish the nature and extent of permanent disability, the Court made its finding that Mrs. Lamberson sustained "some permanent dis-

ability" (Tr. p. 23), and made an award of $1750.00 for general damages, and $195.00 for special damages. (Tr. p. 24.)

Although these sums are not itemized, it may be assumed that the award for special damages in the amount of $195.00 was intended as compensation for the loss of earnings (Tr. pp. 82, 83) estimated at $60.00 per month for over three months. This leaves the sum of $1750.00 as compensation for the pain and suffering and permanent disability.

However, that portion of the judgment which is founded upon compensation for permanent disability is without foundation in the record. There is no medical evidence of permanent disability, and the testimony of Mr. and Mrs. Lamberson was not directed to that question, nor was it competent to establish permanent disability.

It has been held that a plaintiff's statement respecting permanent disability from an accident, uncorroborated by medical testimony, is insufficient to establish the fact of permanent injury.

Simon v. Toye Bros. Yellow Cab Co. (L. A. App. 1934), 152 So. 606;

Forrest E. Gilmon Co. v. Hurry, 165 Okla. 29, 24 Pac. (2d) 653;

Greyhound Lines v. Davis, 290 Ky. 362, 160 S. W. (2d) 625.

Such a judgment for damages for permanent disability cannot stand unless the question of permanent

injury is supported by positive and satisfactory evidence.

Shuck v. Keefe, 205 Iowa 365, 218 N. W. 31;
Louisville and N. R. Co. v. Lewis, 211 Ky. 830, 278 S. W. 143;
Chesapeake O. Ry. Co. v. McCullogh, 236 Ky. 647, 33 S. W. (2d) 655;
Herndon v. Waldon, 243 Ky. 312, 47 S. W. (2d) 1047;
Klein v. Medical Bldg. Realty Co., 147 So. 122 (La. App. 1933).

It is submitted that the portion of the judgment purporting to compensate plaintiff for permanent injuries cannot stand because there is no expert testimony in support of permanent injury, and that the testimony of Mrs. Lamberson was not competent for this purpose because it does not meet the test of the cases set forth above.

However, even if the Court deems that there is such positive and satisfactory evidence supporting the finding of "some permanent disability" (Tr. p. 23), the judgment cannot stand because the Court made no segregation or deduction of damages based upon the preexisting chronic arthritis. The judgment for damages for permanent injuries cannot stand because it must be presumed that the Court in charging defendant with liability therefor did not deduct or segregate any portion thereof as attributable to preexisting chronic arthritis of the hands and wrists contributing to the disability. The authorities overwhelmingly support the necessity of such segregation.

In *Union Oil Co. of California v. Hunt,* 111 Fed. (2d) 269, this Honorable Court on April 24, 1940, established the law for this circuit in a decision which after a review of the authorities and decisions at large including a review of the law as announced by the Idaho Supreme Court, said at page 277:

> " 'If the facts of aggravation of injury are proved, the wrongdoer must answer for any aggravation of the plaintiff's condition for which he is responsible, and that is the limit of his liability.' Sutherland on Damages, Vol. 4, Sec. 1244, p. 4676. The recovery, however, must not include damages for injuries which result from the original injury, but must be confined to damages for aggravation of that condition or injury. *Jones v. Caldwell,* 20 Idaho 5, 116 Pac. 110, 48 L. R. A. N. S. 119, 121. It follows then, that the plaintiff cannot recover in this action for any injuries received prior to November 5, 1934, *Maynard v. Oregon R. R. Co.,* 46 Or. 15, 22, 78 Pac. 983, 68 L. R. A. 477. The difficulty with the situation presented here lies in the fact that much of the evidence of pain and suffering and other damages applied only to the first injury for which any right to recover was altogether abandoned during the trial—at just what stage of the proceeding is not apparent. So we have the anomaly of an award of damages for a second injury based upon improperly admitted evidence concerning a prior injury. Evidence of the first injury and damage thereunder is irrelevant for any purpose, other than to show aggravation * * * This does not preclude, however, the reception in evidence of testimony of the plaintiff's condition im-

mediately preceding the second injury which would be admissible for the purpose of showing a base or standard for measuring the damages suffered by the plaintiff in said second injury.

"It is said in the article on Damages in American Jurisprudence:

" 'The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or as the rule is sometimes stated, must be certain both in their nature, and in respect of the cause from which they proceed.' 15 *Am. Jur.* Sec. 20, p. 410.

" 'The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of. Hence no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause. * * * 15 *Am. Jur.* Sec. 22, p. 413.' "

Upon the face of the record, the Court in making its award has made no segregation between the disability due to the arthritic condition of plaintiff before the accident, and the limited consequences lawfully assignable to the accident, but the major portion of the award is compensation for disability due to the natural progression of a chronic disease, and the cure

thereof, with which defendant is not chargeable or liable in law, and therefore this judgment must be reversed.

Dated, Oakland, California,
April 26, 1943.

Respectfully submitted,
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